

NO. PD-0804-19

**In the
Court of Criminal Appeals
Austin, Texas**

FILED
COURT OF CRIMINAL APPEALS
9/4/2019
DEANA WILLIAMSON, CLERK

JOE LUIS BECERRA,
Appellant,

v.

THE STATE OF TEXAS

On Appellant's Petition for Discretionary Review
From the Tenth Court of Appeals in Case No. 10-17-00143-CR
Affirming the Conviction in Cause No. 14-03925-CRF-361
In the 361st District Court of Brazos County, Texas.

**STATE'S REPLY TO APPELLANT'S
PETITION FOR DISCRETIONARY REVIEW**

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ORAL ARGUMENT IS REQUESTED

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TRIAL COURT:

Presiding Judge Steve Smith (Jury Selection)
Sr. Visiting Judge J.D. Langley (Trial)
361st District Court
Brazos County, Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and files this reply brief in compliance with Rule 68, Texas Rules of Appellate Procedure, in response to Appellant's Petition for Discretionary Review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not believe oral argument would materially aid this court in reaching a decision. Therefore, the State requests oral argument only if granted to Appellant.

STATEMENT OF THE CASE

Appellant, Joe Becerra, was indicted for the offense of Unlawful Possession of a Firearm by a Felon. (CR at 5). The case was tried to a jury and on March 8, 2017, the jury found Appellant guilty of the offense. (4 RR 46). Prior to trial, the State gave notice of Appellant's punishment enhancements. (2 RR at 8). The trial court found the punishment enhancements to be true and assessed punishment at fifty-five years in prison. (4 RR 89-91). On April 27, 2017, the trial court held a hearing on Appellant's motion for new trial and denied it. (5 RR 28; Supp. CR 97). Appellant appealed his case to the Tenth Court of Appeals. (Supp. CR 194).

STATEMENT OF PROCEDURAL HISTORY

The Tenth Court of Appeals affirmed Appellant's conviction on June 12, 2019. *Becerra v. State*, No. 10-17-00143-CR, 2019 WL 2479957 (Tex. App.—Waco June 12, 2019, pet. filed). Appellant's motion for rehearing was filed on June 20, 2019, and denied on July 5, 2019.

GROUND FOR REVIEW (RESTATED)

The court of appeals correctly held that Appellant failed to preserve error concerning the presence of the alternate juror in the jury room by finding Appellant's objection and motion for mistrial to be untimely. The court of appeals was correct to further hold that Appellant's motion for new trial did not preserve error since no timely objection was made during trial.

ARGUMENT

The court of appeals correctly held that Appellant failed to preserve error concerning the presence of the alternate juror in the jury room by finding Appellant's objection and motion for mistrial to be untimely.

This case does not represent the “opportunity to inform, clarify and analyze” that Appellant contends. (Petition at 13). Appellant urges this Court to exercise its discretion to review his case because, according to Appellant, the court of appeals has decided an important question of law that is either unsettled or decided in a way that conflicts with applicable decisions of the Court of Criminal Appeals. (Petition at 8); *see* Tex. R. App. P. 66.3 (a) & (c). The State responds that the opinion of the Tenth Court of Appeals is consistent with this Court’s precedent in *Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010). The court of appeals followed *Trinidad* when it (a) determined that the specific error involved in this case is subject to the contemporaneous objection rule, and (b) held that Appellant failed to make a timely objection. *Becerra*, 2019 WL 2479957, at *1.

As this Court noted in *Trinidad*, “allowing [alternate jurors] to be present with regular jurors during their deliberations is more usefully conceived of as an error in allowing an outside influence to be brought to bear on the appellants’ constitutionally composed twelve-member juries,” and such an error is controlled by Tex. Code Crim. Proc. art. 36.22. *Trinidad*, 312 S.W.3d at 28. This Court then found Article 36.22 to be subject to the contemporaneous objection rule. *Id.* at 29.

The facts of this case are similar to those in *Trinidad* in that this record shows that Appellant did not “suffer[] the verdict of a jury of more than twelve members in violation of Article V, Section 13.” *Trinidad*, 312 S.W.3d at 28. Thirteen people went into the jury room to deliberate, but only the twelve jurors convicted Appellant. (4 RR at 46-47). The alternate juror was removed before the jury rendered its ultimate verdict to the court, and the twelve jurors were instructed by the court to disregard the participation of the alternate juror. (4 RR at 43). Appellant agreed to the trial court’s instruction to the jury, and when he had the opportunity to question jurors concerning the influence of the alternate juror upon deliberations, he did not inquire. *Becerra*, 2019 WL 2479957, at *2.

By its ruling, the Tenth Court of Appeals followed *Trinidad*, which held that the presence of an alternate juror, who is removed prior to the rendering of the ultimate verdict, is controlled by Article 36.22 and is also subject to the contemporaneous objection rule. *Trinidad*, 312 S.W.3d at 28-29. The Tenth Court correctly viewed this issue as a violation of Article 36.22 and not a waiver-only constitutional violation as claimed by Appellant.

Appellant mistakenly relies on what he refers to as “uncontroverted evidence” from the hearing on the motion for new trial to stake his claim that this case presents a violation of Article V, Section 13 of the Texas Constitution rather than a violation of Article 36.22. (Petition at 8). But, the “uncontroverted evidence” he relies on is

refuted by the record. The State called the trial court's attention to the presence of the alternate juror in the jury room. (4 RR at 35). The alternate was removed, and the trial court instructed the jury to disregard the alternate juror's participation and resume deliberations. (4 RR at 43). Only then did the twelve remaining jurors render their ultimate verdict. (4 RR at 46-47). It is of no significance that thirteen jurors unanimously agreed upon Appellant's guilt prior to the alternate's removal because the trial court instructed the jury to disregard the extra vote for guilt. (4 RR at 43).

The court of appeals was correct to further hold that Appellant's motion for new trial did not preserve error since no timely objection was made during trial.

This Court has held that a motion for new trial is sufficient to preserve error where there was "no opportunity to object to the trial court's action until after that action was taken." *Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992). On the other hand, where a defendant has the opportunity to object, a motion for new trial does not preserve error. *See Hardeman v. State*, 1 S.W.3d 689, 690 (Tex. Crim. App. 1999).

The court of appeals opinion is consistent with this Court's precedent in *Issa* and *Hardeman*. Appellant had the opportunity to object during trial when the trial court sent the alternate juror into the jury room after closing arguments. The court of appeals correctly observed that Appellant's trial counsel was aware that an alternate had been selected during voir dire, and that the alternate was sitting with

the jury throughout trial and at the time the jury was sent to deliberate. *Becerra*, 2019 WL 2479957, at *2.

Since a violation of Article 36.22 is subject to the contemporaneous objection rule, and since Appellant was afforded the opportunity to object and no timely objection was made, a motion for new trial could not have preserved this issue. *See Hardeman*, 1 S.W.3d at 690.

Appellant urges this court to grant review “and determine if Article V, Section 13 claims are preserved” by a motion for new trial. (Petition at 17). *Trinidad*, however, stands for the proposition that the presence of an alternate juror is controlled by Article 36.22 and is subject to the contemporaneous objection rule. *Trinidad*, 312 S.W.3d at 28-29. A true claim arising from Article V, Section 13 would include in its facts that a thirteenth juror had rendered the **ultimate** verdict of guilt. *See Trinidad*, 312 S.W.3d at 28.

Since only twelve jurors rendered the ultimate verdict in this case, Appellant’s claim was properly addressed of as a violation of Article 36.22. The court of appeals correctly applied the precedent of this Court in this regard, and Appellant’s petition should be denied.

PRAYER

The State prays that the Court refuse Appellant’s Petition for Discretionary Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the *STATE'S REPLY TO APPELLANT'S PETITION FOR DISCRETIONARY REVIEW* was delivered to the following on September 3, 2019 by the manner listed below:

Lane Thibodeaux via email: lanet1@msn.com
Attorney for Appellant

State's Prosecuting Attorney via email: information@spa.texas.gov

/s/ Nathaniel T. Wood

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I certify that the foregoing document has a word count of 1,182 based on the word count program in Microsoft Word 2016.

/s/ Nathaniel T. Wood